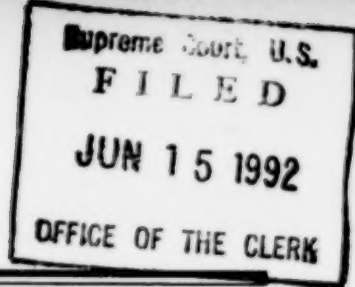




No. 91-781



IN THE
Supreme Court Of The United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDINGS,
APPURTENANCES AND IMPROVEMENTS
KNOWN AS 92 BUENA VISTA AVENUE,
RUMSON, NEW JERSEY, AND
BETH ANN GOODWIN

Respondent.

On Writ of Certiorari To
The United States Court of Appeals
For The Third Circuit

BRIEF AMICUS CURIAE OF THE
FEDERAL HOME LOAN MORTGAGE CORPORATION
IN SUPPORT OF THE RESPONDENT
BETH ANN GOODWIN

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QUESTION PRESENTED FOR REVIEW

Whether the relation-back provision of 21 U.S.C. § 881 divests an innocent owner, including a bona fide purchaser, of his/her interest in real property that is otherwise protected by the innocent owner defense.

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STATUTORY PROVISIONS

Section 511 of the Controlled Substances Act of 1970, 21
U.S.C. § 881(a)(6) provides:

The following shall be subject to forfeiture to the United
States and no property right shall exist in them:

* * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U.S.C. 801-904], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without knowledge or consent of that owner.

21 U.S.C. § 881(h) provides:

Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

INTRODUCTION

Congress acknowledged the long and effective history of forfeiture law when it resurrected this remedy as a means to combat crime. But, recognizing fundamental fairness, Congress drafted 21 U.S.C. § 881(a)(6) expressly to blunt the harsh and unfair sweep of the forfeiture law by protecting the interests of innocent owners. Congress meant this protection to be interpreted broadly, and intended Section 881(a)(6) to shield the interests of all innocent owners, including the innocent lender. Such protection is essential to the efficient functioning of the home lending industry. The bedrock of the mortgage industry is predictability—assurances of title that are traced backwards for decades; enforceable mortgages that look forward for an equal period of time. The government suggests that the Court read the relation-back provision virtually to nullify the innocent

owner defense. Such a reading would supplant predictability with uncertainty and jeopardize the interest of innocent lenders. This is not what Congress intended, and it is not wise public policy.

INTEREST OF THE AMICUS

The Federal Home Loan Mortgage Corporation (“Freddie Mac” or “FHLMC”) is a corporate instrumentality of the United States, created by Congress in 1970.¹ FHLMC operates in the “secondary mortgage market”; that is, FHLMC does not originate home loans or service them. Rather, FHLMC and other secondary market investors purchase mortgages from banks, savings associations, and other lenders who originate the loans on the primary mortgage market. FHLMC, in turn, “packages” the mortgages and sells them to investors in the form of mortgage-backed securities which represent various interests in the packaged mortgages. The funds obtained by the sale of the securities flow back to the lenders when FHLMC purchases the mortgages. The lenders then have additional capital available to make home loans.

Congress created FHLMC to foster and promote a secondary mortgage market for the purchase and sale of mortgages on residential property. But the government’s “take no prisoners” interpretation of Section 881 will impair FHLMC’s ability to fulfill this mandate by needlessly creating uncertainty about the enforceability of home mortgages.

SUMMARY OF ARGUMENT

1. The Third Circuit’s construction of 21 U.S.C. § 881(a)(6) and (h), making the relation-back doctrine inapplicable to property excepted from forfeiture under the innocent

¹ Congress created FHLMC through the Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 12 U.S.C. §§ 1451-59, as amended by Pub. L. No. 101-73, § 731 (1989).

owner defense, follows the plain language of the statute and is clearly supported by the legislative history.

2. The government's proposed interpretation of the statute forces an overlay of additional words onto the statute's plain language which was unintended by Congress. The government proposes to redefine the term "owner" and to alter the timing of when "knowledge and consent" should be examined. Both proposals will lead to arbitrary results wholly unsupported by the statute or legislative history.

3. While the legislative history demonstrates an intention to protect the interests of all innocent owners, at a minimum, Congress intended to safeguard the property interests of bona fide purchasers ("BFP"). The express legislative history of Section 881 and the legislative history of the corollary criminal provision both demonstrate this Congressional intent. Adoption of the government's position that no protection be afforded any after-acquired interest, even that of a BFP, would create the anomalous result that a BFP could demonstrate innocent ownership under the criminal, but not the civil, forfeiture statute. In addition, interpreting the statute so as to deprive BFPs of their property without even an opportunity to be heard is to create an unnecessary question regarding the constitutionality of the statute. Such an analysis should be avoided as a matter of accepted statutory construction and sound public policy.

4. The disposition of this case may well determine more than the validity of the Respondent's ability to demonstrate innocence. The mortgage industry is comprised of an interlocking system of lenders, secondary mortgage market entities (such as the Federal Home Loan Mortgage Corporation), securities investors, and individual homebuyers. The foundation of the industry is the stability and reliability of the enforceable home mortgage. The expansive reading of the relation-back clause sought by the government will undermine the enforceability of the home mortgage through no fault or oversight of the lender.

Lenders and other innocent owners will needlessly suffer losses without any commensurate benefit to the statutory purpose of fighting the war on drugs. Undesirable side effects, such as illegal discrimination in lending practices, could be fueled by lenders' apprehension of future losses. Ultimately, the American homebuyer will pay the price for this uncertainty. Such a result was expressly avoided through Congress' enactment of the innocent owner exception.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW SHOULD BE AFFIRMED

A. The Third Circuit's Analysis Follows the Plain Language Of The Statute And The Legislative History

The Third Circuit in the case below interpreted 21 U.S.C. § 881 to give effect both to the relation-back provision of Section 881(h) while at the same time protecting innocent owners under Section 881(a)(6). *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey and Beth Ann Goodwin*, 937 F.2d 98, *reh'g denied* (3d Cir. 1991) (hereinafter "*Buena Vista*"). The court reasoned that, since Section 881(h) expressly vests title to the United States in "property described in subsection (a)," and subsection (a) provides an exception for innocent owners, then the first inquiry must be whether the property is exempt from forfeiture due to the innocence of the owner. If so, then Section 881(h) does not apply to that owner's interest in the property. *Buena Vista*, 937 F.2d at 101-02.

The court noted that the plain language of the statute speaks only in terms of an "owner" and in no way limits the definition of this term. *Id.* at 101. Indeed, the court noted that Congress chose the broader term "owner" for the civil statute, and not the more restrictive "bona fide purchaser for value" wording used

in the criminal forfeiture statute. *Id.* at 102. Therefore, Congress adopted a broader scope of protection under Section 881.

A broad definition of "owner," which covers all entities with an interest in the property, is clearly supported by the case law. *See, e.g., United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1279 (9th Cir. 1983). There, the government's argument that a subsequent purchaser of the yacht lacked "standing" to contest the forfeiture failed. "[O]ne who contests a forfeiture must be a claimant. A 'claimant' is one who claims to own the article or merchandise or to have an interest therein." (Citations omitted). *See also United States v. \$321,470.00 U.S. Currency*, 874 F.2d 298, 303 (5th Cir. 1989) (reviewing the Joint Explanatory Statement of Titles II and III, Pub. L. No. 95-633, 95th Cong. 2d Sess., reprinted in 1978 U.S.C.C.A.N. 9496, 9518, 9522-23); *In Re Metmor Fin., Inc.*, 819 F.2d 446, 448 n. 2 (4th Cir. 1987); *United States v. Real Property Titled in Name of Shashin, Ltd.*, 680 F. Supp. 332, 334 (D. Haw. 1987).

In addition to recognizing the plain language of the statute, the Third Circuit also examined its earlier analysis of the legislative history behind the innocent owner exception. *Buena Vista*, 937 F.2d at 102, citing the remarks of Senators Nunn and Culver described in *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 625, reh'g denied *en banc*, 890 F.2d 659 (3d Cir. 1989) ("*Grubb Road*"). The court noted the remarks of Senator Culver, commenting on legislators' concerns about the overbreadth of one version of the statute.

Specifically, it was noted that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. *The original language is modified in the proposed amendment in*

order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction.

124 Cong. Rec. 23056 (daily ed. July 27, 1978) (emphasis added). This legislative history demonstrates unambiguously that the term "owner" was meant to be interpreted broadly and to afford protection to those who obtain ownership without knowledge of any illegality.

In the case below, the Third Circuit carefully reviewed both the express statutory language and the legislative history behind the statute. *Buena Vista*, 937 F.2d at 101-03. The Court's analysis is true to proper statutory construction and gives meaning to the unambiguous language of the statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The analysis also allows the relation-back theory and the innocent owner defense of the statute to coexist without diminishing the effectiveness of the law. Innocent owners are protected, but drug dealers will not enjoy the fruits of their profession.

B. The Government's Proposed Analysis Is Strained And Unsupported By Either The Statutory Language Or The Legislative History

Judge Mansmann, writing for the court below, correctly identified the flaw in the government's position:

... to interpret section 881(h) in the manner suggested by the government would essentially serve to emasculate the innocent owner defense provided for in section 881(a)(6). No one obtaining property after the occurrence of the drug transaction—including a bona fide purchase[r] for value—would be eligible to offer an innocent owner defense on his behalf.

Buena Vista, 937 F.2d at 102.

This was not the result intended by Congress. Section I. A., *supra*.

The government's proposed interpretation rests primarily on two assumptions:

- (1) The word "owner" in § 881(a)(6) actually means an owner who acquired the property prior to the acts triggering forfeiture; and
- (2) The "knowledge or consent" of the owner actually means knowledge or consent at the time the acts triggering forfeiture occurred.

Pet. Brief at 10-11.

Both assumptions require an unnatural and unsupportable reading of the statute, and will lead to results not intended by Congress.

1. Congress did not Intend the Term "Owner" to be Restricted by the Date of Acquisition

Congress intended that the word "owner" be given its plain meaning and that an owner's innocence, rather than the timing of the property's acquisition, be dispositive of the owner's rights. The government attempts to read Section 881 for the proposition that an owner's innocence is irrelevant if the interest in the property was acquired after the act triggering forfeiture. Pet. Brief at 21-23. Section I. A., *supra*. There is no legislative history and certainly no language in the statute to support this restrictive definition. Indeed, the government's reliance on *United States v. Stowell*, 133 U.S. 1 (1890) is misplaced for the very reason that Congress expressly rejected this harsh approach in 1978 and again when amending the statute in 1982 and 1984. In *Stowell*, the Court held that, when the property right vests in the United States, the vesting "avoids all intermediate sales and alienations, even to purchasers in good faith." *Id.* at 17. Had Congress intended to codify the *Stowell* result, it could have simply used the clear and oft-quoted language from that case. Instead, Congress chose to formulate an *express exception* to

this harsh result; that is, the innocent owner defense of Section 881(a)(6). The term "owner" is not qualified by the adjectives that the government presumes to insert, such as "original owner," "existing owner," or, borrowing language from *Stowell*, "owner at the time the offense is committed." *See, e.g.*, 133 U.S. at 17. In addition, Congress chose to refer to "the interest of *an* owner," rather than "*the*" owner, indicating that Congress did not mean to focus on a specific owner at a specific point in time.

The language of the statute also contemplates subsequent transferees in its use of the word "proceeds." As one court reasoned,

... as "proceeds" under section 881(a)(6) necessarily bear the imprimatur of a *prior* illegal drug transaction, Congress' enactment of the innocent owner exception to that section serves to underscore the ability of a subsequent transferee, under certain circumstances, to obtain innocent owner status.

United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Fla., 683 F. Supp. 783, 788 (S.D. Fla. 1988). Judge Murnaghan made a similar observation in his concurring opinion in *In Re One 1985 Nissan, 300 ZX*, 889 F.2d 1317, 1322 (4th Cir. 1989) ("How can one obtain drug deal proceeds before the transaction even takes place?") (J. Murnaghan, concurring).

In addition, had Congress intended Section 881(h) to dichotomize the treatment of property acquired before and after the triggering act, it could have done so simply by amending (a)(6). For example, Congress could have signalled this intent by drafting (a)(6) as "... except that no property, *other than after-acquired property*, shall be forfeited." However, Congress did *not* adopt such limiting language, and the government should not be permitted to rewrite the statute.

The codification of the relation-back doctrine in Section 881(h) was enacted as an uncontroversial recognition that relation-back applied to forfeitures under Section 881(a). There is no indication that Congress meant the provision as a repudiation of established law.

... The Senate Report on the Comprehensive Crime Control Act of 1984 devotes thirty full pages to the forfeiture amendments contained in Title III of the Act. The amendment clarifying that relation back applies to section 881 is scarcely even mentioned in the Report because it was so insignificant and uncontroversial. The Report merely notes that the relation back principle is "well established in current law." If Congress intended to eviscerate or sharply curtail the innocent owner provision of section 881(a)(6) by enacting section 881(h), the provision would have been very important and the Senate Report would not have passed over it so quickly.

David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶4.03[i], at 4-74 (1991).

In addition, repeals by implication are disfavored under the rules of statutory construction. Where there is no express intention to repeal, implied repeal is permissible only where the earlier and later statutes are irreconcilable. *Id.*, citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). As the court below demonstrated, Sections 881(a) and 881(h) dovetail logically when read with their plain meaning.

Under the government's theory, the fortuity of the timing of ownership, rather than the merits of innocence, will determine which owners must bear an unexpected and undeserved loss. For example, an innocent owner who purchases property the day prior to the act causing forfeiture will be able to demonstrate innocence and recover his property. But his innocent but un-

lucky counterpart, purchasing the day *after* the act, will lose his entire investment. No benefit attaches to this aberrant result, and Congress did not intend such an anomaly.

2. An Owner's Standing to Demonstrate Innocence Should be Viewed at the Time the Property Is Acquired

The other assumption in the government's proposal is that the owner's ability to prove lack of knowledge or consent is viewed at the moment of the act triggering forfeiture, rather than at the time the property is acquired. Again, there is no legislative history or statutory language to support such a reading, and again, fortuity would reign. For example, in a case where a series of triggering acts occurred over a period of time, the act chosen to show probable cause would also determine whether an innocent owner is barred from recovering his property. The potential capriciousness of such a result is self-evident. It makes no sense, and certainly does not further the drug-fighting goal of the statute, to take a snapshot of the owner's knowledge when the act occurs. Rather, an owner's standing to seek an exception to forfeiture is viewed at the time the property is acquired, and the owner's innocence remains a factual inquiry.

The criminal statute, 21 U.S.C. § 853(c) speaks in terms of a "bona fide purchaser at the time of purchase." There is no reason to believe that Congress intended a totally different time frame to be invoked in Section 881(a)(6) and yet chose not to specify the change. It is far more likely that Congress intended the relevant time period to be when the property is acquired.²

² The government weaves an entangled web in its example at Pet. Brief 10-11. The government describes an "absurd result" that occurs when an owner claims innocence because he had no knowledge of illegality *at the time of the act*, but subsequently learned of the taint prior to acquisition. The government concludes that the only resolution is to bar claims by all "after-acquired" innocent owners. *Id.* However, the absurdity is created only by the government's convoluted reading of (a)(6). The "absurd result" never occurs if the statute is read plainly—that the court examines knowledge or

The government's argument that "owner" implicitly carves out after-acquired property, as well as the government's interlineation into the statute that "knowledge" means "at the time of the act," are unsupported, unnecessary and could lead to unintended results. If one reads the statute plainly, as did the court below, "owner" maintains its common meaning and protects owners who can demonstrate innocence. The court will judge the owner's state of mind at the time of acquisition by examining "knowledge or consent." The goal of the statute will obtain, with malfeasants penalized and innocent owners spared.

C. At A Minimum, Section 881 Provides For The Rights Of A Bona Fide Purchaser

The legislative history of the innocent owner exception demonstrates the intention that the term "owner" should be interpreted broadly to afford protection for all innocent owners. See Section I. A., *supra*. But, at a minimum, Congress intended the property interests of a BFP to be protected.³

The legislative history of Section 881(a)(6) specifically addresses the BFP issue:

... at the request of Senator Mathias and Senator Wallop's staff, we did add a provision in the modifica-

consent at the time the property is acquired. Any party who acquires real property knowing it constitutes drug proceeds would be unable to claim innocent ownership because he would have learned the status of the property prior to obtaining an ownership interest. Thus, the government's fear of an absurd result is unpersuasive, as a plain reading of the statute would preclude this scenario.

³ There is no dispute that a mortgagee or other lienholder can qualify as an innocent owner under section 881(a). See, e.g., *United States v. One Urban Lot Located at 1 Street A-1, Valparaiso, Bayamon, P.R.*, 865 F.2d 427, 430 (1st Cir. 1989); *In Re Metmor Fin., Inc.*, 819 F.2d 446, 448 n. 2 (4th Cir. 1987). See David F.B. Smith, *Mortgage Lenders Beware: The Threat To Real Estate Financing Caused By Flawed Protection For Mortgage Lenders In Federal Forfeiture Actions Involving Real Property*, 25 Real Property, Probate and Trust Journal 481, 499 n. 45 (Fall 1990).

tion to make it clear that *a bona fide party who has no knowledge or consent* to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.

That is the purpose of the wording added to the modification, in addition to some other wording in the modification making the amendment broader than it otherwise would have been.

124 Cong. Rec. 23057 (daily ed. July 27, 1978)(statement of Senator Nunn)(emphasis added).

The very words used by Senator Nunn, "no knowledge or consent," form the innocent owner exception to (a)(6). The court in *United States v. One Single Family Residence Located at 6960 Miraflores Avenue, Coral Gables, Fla.*, 731 F. Supp. 1563 (S.D. Fla. 1990), directly rejected the government's argument (argued again in this case) that the innocent owner exception applies only to claimants who owned the property at the time of the offense. Reviewing Senator Nunn's remarks, the court held:

Thus, Congress believed that the innocent owner exception would protect bona fide purchasers who acquired ownership of the property subsequent to the offense giving rise to the forfeiture. The Government's position to the contrary is simply not supported by the legislative history of the statute.

Miraflores, 731 F. Supp. at 1568.

Similarly, the court in *United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Fla.*, 683 F. Supp. 783 (S.D. Fla. 1988) rejected the government's argument that the codification of relation-back necessarily precludes a BFP from being an innocent owner under Sections 881(a)(6) and (a)(7). The court observed that "section 853(c) of the

criminal forfeiture statute . . . codified *both* the relation back doctrine and the bona fide purchaser exception." *Id.* at 787. Thus, the two provisions need not be mutually exclusive. The district court below also found this reasoning persuasive and noted that it is accepted practice in fraudulent conveyance law and under the uniform commercial code to make an exception for a BFP, but not for other transferees. *United States v. A Parcel Of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey*, 738 F. Supp. 854, 861 (D.N.J. 1990). Therefore, it would not be an unusual exception to include in a forfeiture statute.

It is noteworthy that neither of the circuit court cases relied upon by the government addressed the issue of a BFP. See *Eggleston v. Colorado*, 873 F.2d 242 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *In Re One 1985 Nissan, 300 ZX*, 889 F.2d 1317 (4th Cir. 1989). In *Nissan*, the Fourth Circuit specifically noted that it was not considering a BFP situation. *Nissan*, 889 F.2d at 1321 n. 4. Moreover, the concurring opinion in that case argued forcefully for a BFP exception to relation-back: "It seems manifestly unfair to penalize an innocent person who has provided something of value in exchange for property that, unbeknownst to him, had been used in or derived from drug trafficking." *Nissan*, 889 F.2d at 1322 (J. Murnaghan, concurring, joined by C. J. Ervin and J. Phillips).

The legislative history of the relation-back provision of the Racketeering Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1963(c) (Supp. V 1987), and the contemporaneous passage of Section 881(h) also are instructive:

In codifying the relation-back doctrine in subsection 881(h), Congress incorporated the concurrent legislative history of the RICO statute. Importantly, this history explicitly states that the relation-back doctrine "should not operate to the detriment of innocent *bona fide purchasers* of the defendant's property . . . [and]

that this provision may not result in the forfeiture of property *acquired by an innocent bona fide purchaser*." Consequently, despite Congress's failure expressly to codify these protections under subsection 881(h), the evidence suggests that, as with subsections 881(a)(6) and (7), the operation of an implied bona fide innocent-purchaser exception was hardly outside legislative consideration.

Mark A. Jankowski, *Tempering the Relation-Back Doctrine: A More Reasonable Approach To Civil Forfeitures In Drug Cases*, 76 Va. L. Rev. 165, 185 (1990).

The juxtaposition of Section 881 and the criminal forfeiture provision (which expressly provides for the BFP) highlights another anomalous result of the government's interpretation. That is, a BFP would avoid forfeiture under the criminal forfeiture statute, but would not even have an *opportunity* to prove its innocence in the civil forfeiture proceeding. It was not the intent of Congress to have the arbitrary choice of proceeding, civil or criminal, predetermine the *result* of the BFP's interest. The innocent owner provision avoids this nonsensical outcome.

In addition, under the government's reading, a BFP can be divested of its property without any hearing whatsoever, and without regard to the owner's innocence. Precluding innocent owners from having an opportunity to be heard raises fundamental issues of constitutionality which Congress meant to avoid through the innocent owner exception. This Court has suggested that such an unforgiving statute would be unconstitutional:

[I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent

the proscribed use of his property: for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90, *reh'g denied*, 417 U.S. 977 (1974). Several courts have reasoned that the government's interpretation would be violative of due process. See e.g., *United States v. One Single Family Residence Located at 6960 Miraflores Avenue, Coral Gables, Fla.*, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990); *6109 Grubb Road*, 886 F.2d at 622; *Monroe Savings Bank, FSB v. Catalano*, 733 F. Supp. 595, 598-99 (W.D.N.Y. 1990). Moreover, the government's reading of Section 881 would violate a cardinal principle of statutory construction; that is, to read the statute so as to avoid potential constitutional defects. *N.L.R.B. v. The Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). The government's proposed reading here creates a constitutional defect.

The government's position also raises the question of whether such a "take-all" reading of the relation-back provision would violate the proportionality standard of the Eighth Amendment. The wrongdoer's violation would wipe out all interests of all after-acquiring owners, irrespective of their innocence and no matter how disproportionate the penalty is to the circumstances. The Eighth Amendment has been held not to apply in civil proceedings. See, e.g., *United States v. Tax Lot 1500, Township 38 South, Range 2 East, Section 127, Further Identified as 300 Cove Road, Ashland, Jackson Co., Ore.*, 861 F.2d 232 (9th Cir. 1988), *cert. denied sub nom. Jaffe v. United States*, 493 U.S. 954 (1989). However, recent Supreme Court cases suggest that the Eighth Amendment could apply to certain civil forfeitures. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). See generally David F. B. Smith, *Mortgage Lenders Beware: The Threat To Real Estate Financing Caused*

By Flawed Protection For Mortgage Lenders In Federal Forfeiture Actions Involving Real Property, 25 Real Property, Probate and Trust Journal 481, 495-98 (Fall 1990). This Court's opinion in *Stowell*, more than a century ago, suggested that the proportionality of the forfeiture should be considered. The Court compared two forfeiture statutes and reasoned:

... But it is hard to believe that congress intended that a forfeiture of real estate, under this section, for not keeping books, should be more comprehensive than the like forfeiture, under the leading section already considered for the graver offense of carrying on the business of a distiller without having given bond.

United States v. Stowell, 133 U.S. 1, 16 (1890).

The Court continued that the more reasonable reading was to allow the forfeiture of personalty, "... but, as to the real estate, to forfeit only the right, title, and interest of the distiller, and of any persons who participate in or consent to the carrying on of the distillery." *Id.* It would be unfair and a disproportionate penalty to interpret Section 881 in a way that would forfeit, without any constitutional due process, not only the wrongdoer's interest in the property, but the interests of all BFPs as well.

Decidedly, there is the overriding concern of fairness. In a statute whose purpose is to "stri[k]e at profits from illicit drug trafficking," 124 Cong. Rec. 23056 (daily ed. July 27, 1978)(statement of Sen. Culver), it does nothing to advance the purpose of the law by forcing losses on BFPs. The only possible "benefit" would be to supplement the coffers of the United States to fund the war on drugs. But it is unjust to extract such funding from innocent owners. See, e.g., *Metmor*, 819 F.2d at 450 n. 7 (the government's retention of post-seizure interest and expenses could only be to "boost the federal treasury"). See also *United States v. Four Parcels of Real Property on Lake Forrest*

Circle in Riverchase, Shelby County, Ala., 870 F.2d 586, 590 n. 11, 591 n. 12, 594 (11th Cir. 1989).⁴

II. THE GOVERNMENT'S "TAKE ALL" INTERPRETATION OF THE RELATION-BACK PROVISION WOULD SERIOUSLY UNDERMINE THE CERTAINTY NECESSARY TO THE MORTGAGE INDUSTRY

The mortgage industry would bear the fallout from the government's unsupportable reading of Section 881. But those ultimately hurt will be the nation's homebuyers.

FHLMC's corporate mission was set forth by Congress:

It is the purpose of the Federal Home Loan Mortgage Corporation—

- (1) to provide *stability* in the secondary market for home mortgages;

⁴ The government asserts that "truly blameless parties," Pet. Brief at 12, may be able to avoid forfeiture of their properties because of the administrative procedures of the Attorney General, and therefore, that bona fide purchasers should not be concerned about the interpretation of the statute. Pet. Brief at 37-39. First, such procedures cannot justify an unintended reading of the statute. Second, the procedures do not provide the necessary safeguards for innocent owners, including BFPs. These regulations are unenforceable, *United States v. Caceres*, 440 U.S. 741, 753 (1979), and provide no substitute for legal rights.

Any remission lies within the sole discretion of the Attorney General and is essentially an unreviewable decision. See *Grubb Road*, 886 F.2d at 625. A conflict of interest can arise in that the government, as reviewing party, will be the one to benefit economically from the denial of a claim. Further, the standard of proof under the administrative procedures is more stringent than set forth in the statute. The administrative procedures require a showing that the owner took "all reasonable steps" to prevent an illegal use rather than proof of no "knowledge or consent," thus imposing a greater burden on the owner. Calculations of any accepted claim are made according to the administrative procedures and do not afford full consideration of certain costs, attorneys' fees and interest that the owner may otherwise be able to

- (2) to respond appropriately to the private capital market; and
- (3) to *provide ongoing assistance* to the secondary market for home mortgages (including mortgages securing housing for low- and moderate-income families involving a reasonable economic return to the Corporation) by increasing the liquidity of mortgage investments and *improving the distribution of investment capital* available for home mortgage financing.

12 U.S.C. § 1451(b), as amended by Pub. L. No. 101-73, § 731 (1989) (emphasis added).

FHLMC, by statute, may only purchase residential mortgages, and the dollar amount of each single-family loan it can purchase is capped each year.⁵ Federal Home Loan Mortgage Corporation 1991 Annual Report at 9. ("Annual Report"). As a result, FHLMC focuses on the middle class homebuyer. Approximately eighty-four percent of FHLMC's total servicing portfolio consists of fixed-rate mortgages on single family homes. Annual Report at 2. This is where Congress intended FHLMC's strength to be—in providing assistance to the American homebuyer.

The volume of FHLMC's business demonstrates the wide and detrimental sweep of the government's proposed relation-back reading. During 1991, FHLMC purchased \$100 billion in mortgages.⁶ Obviously, with such a huge volume, FHLMC

recover. See, e.g., *Metmor*, 819 F.2d 446, 448, 448 n. 3. Finally, the procedures, as well as the U.S. Dept. of Justice, *Expedited Forfeiture Settlement Policy For Mortgage Holders* (April 1992) can and have been amended by the Attorney General's office in its sole discretion and without notice.

⁵ In 1991, that cap was \$191,250. For 1992, it is \$202,300.

⁶ Purchase transactions can be as small as one mortgage or as large as a record one-time purchase of 72,000 loans.

cannot and does not individually review each of the mortgages prior to purchase.⁷ However, a post-funding quality control review is performed by FHLMC on a certain percentage of all loans purchased.

Similarly, FHLMC does not itself "service" the mortgages it buys.⁸ But, as with the selling of loans, FHLMC provides detailed instructions to its 4,082 servicers across the country to ensure consistency and quality in loan servicing. FHLMC oversees this servicing, administering over five million active loans in each monthly servicing cycle. Video Presentation, "The Back Office," FHLMC Board of Directors Meeting (June 7, 1991).

The destination of the overwhelming proportion of loans purchased by FHLMC is the same. Ninety-five percent of FHLMC loans are "securitized" that is, converted into securities. *Id.*

FHLMC is a large player in the mortgage industry.⁹ Since its creation in 1970, FHLMC has provided financing for one in eight American homes, including more than 700,000 apartment units. Annual Report at 10. In 1991, FHLMC and other secondary market lenders purchased more than \$400 billion of home mortgages. *Id.* at 13. Approximately one of every two conventional mortgages originated by lenders is sold into the secondary market. *Id.* at 7. Keeping this system operating smoothly and

⁷ Although FHLMC does not "make" loans to home buyers, it formulates standards for such origination. These standards are set forth in detail in the two volume Sellers' and Servicers' Guide published by FHLMC, and other contractual documents. They include rigorous underwriting criteria, such as loan-to-value ratio restrictions, the size of the minimum downpayment, and credit and employment documentation.

⁸ "Servicing" includes collecting and accounting for monthly principal and interest payments, conducting property inspections when necessary and contacting the borrower in cases of non-payment or other problems.

⁹ FHLMC is a stockholder-owned corporation, ranked 85th in size by Standard and Poors 500.

with rapid turn-around accomplishes two important goals: 1) reallocation of funds from areas of excess capital to geographical areas where funds for housing are in short supply, and 2) lowering interest rates.¹⁰

This network of mortgage purchases is dependent upon the stability of residential property and the validity and enforceability of the lender's security interest in that property. Therefore, to interpret the relation-back theory as one that "trumps" a valid mortgage—no matter the innocence of the owner—threatens to undercut the stability of this network. If Section 881(a) is interpreted in the manner advocated by the government, even the most responsible lender, exercising proper due diligence and thorough underwriting, could not ensure that its mortgage will be enforceable. Even the most cautious secondary market entity will be uncertain that the mortgage securing the loan is worthy of reliance. And the securities investors, despite certain investment guarantees, may also question the dependability of the underlying collateral.

One result of this uncertainty may be more litigation. The government's proposition that the innocence of the owner is irrelevant in a relation-back context means that an entire group of commercial entities, acting without any knowledge of or consent to a wrongdoing, must bear a loss initiated by the government. Although there will be no "fault" to assess, someone will have to bear the loss. Secondary market players will seek to enforce the warranties made by the primary lender who may, in turn, seek to pass the loss on to others.¹¹ Securities

¹⁰ On average, interest rates on mortgages that qualify for sale to FHLMC are about one half of one percent lower than on non-conforming mortgages. Annual Report at 7.

¹¹ For example, the primary lender may attempt to sue the title insurer. It is unresolved whether forfeiture can trigger a loss provision under a standard title insurance policy. See *United States v. One Parcel of Real Estate, Located on Fellows Tracts C, D, E, and F of Pine Island Estates*, 715

investors, too, may attempt to recover their losses, if any, through litigation.

The American homebuyer will ultimately pay for these losses because the costs will be "priced" into the system. Higher interest rates, decreased access to mortgage funds and perhaps longer delays prior to funding will be borne by the consumer.

Unrestricted relation-back could have other unwanted side effects. For example, lenders may be chilled to report to law enforcement agencies information about drug activity learned after the loan was made for fear it could result in a loss of the entire lien. Such losses may even inadvertently encourage discrimination in lending. Without any opportunity to demonstrate innocent ownership, lenders may refuse to lend their mortgage funds in certain areas; for example, urban centers, low-income areas, neighborhoods known for illicit drugs, or apartment buildings where there is a risk that one wrongdoing tenant could jeopardize the entire collateral. Lenders may be reluctant to accept mortgages from homebuyers with latin sur-names or those who are recent immigrants, suspicious that these borrowers might fit "drug profiles."¹² How ironic that FHLMC's Congressional purpose of providing stability and assistance for home mortgages (including low income housing) and improved distribution of investment capital should be impaired by an overreaching interpretation of another laudable Congressional goal—the eradication of illegal drugs.

F. Supp 360, 363 (S.D. Fla. 1989)(Congress did not intend to "disrupt state regulation of land transfers" or to "place all land titles in doubt because of the 'relation-back'" doctrine).

¹² FHLMC's continuous commitment to its Affordable Housing Program and efforts to work with lenders in uncovering practices that may unintentionally discriminate could thus be undercut by an unforgiving relation-back doctrine.

The irony is compounded by the fact that the secondary mortgage market and the government share mutual goals. Entities such as FHLMC strive hard to purchase only investment quality loans—mortgages tainted with drug money are not only bad policy, they are a bad risk. Thus, a Draconian reading of the relation-back provision of Section 881, in which entities like FHLMC lose all, will not enhance compliance; it will simply cause the loss to be borne by innocent owners. Such a result was not intended by Congress. Indeed, it impairs Congress' goal of broadening home ownership, but does nothing to advance the fight against illegal drugs.

CONCLUSION

It is indisputable that drug dealers should not be allowed to profit from their illegal trade. But the government's desire for an expansive reading of Section 881 is a view of the trees without the forest. Other owners, truly innocent owners, will bear an unnecessary hardship if Section 881 is read to automatically extinguish all interests acquired after the illegal act.

The government's interpretation of the statute would needlessly force unexpected losses of mortgages on an industry built on certainty. The losses would be borne by innocent owners who would not even have the opportunity to demonstrate their innocence. The cost of these losses will be passed on to the American home buyer. Such a result is unfair, unintended, and perhaps unconstitutional.

For the foregoing reasons, FHLMC as amicus curiae respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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